

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3  
4 NICOLE LOGAN, et al.,

5 Plaintiffs,

6 v.

7 WILLIAM WEATHERLY, DAN HARGRAVES;  
8 RUBEN HARRIS; DON HERROF; and  
9 ANDREW WILSON, et al.,

10 Defendants.

11 No. CV-04-214-FVS

12 ORDER RE: PLAINTIFFS' MOTION  
13 TO RECONSIDER DISMISSAL OF  
14 CLAIMS FOR DECLARATORY AND  
15 INJUNCTIVE RELIEF

16 **BEFORE THE COURT** is Defendants' Motion to Reconsider Dismissal of  
17 Claims of Declaratory and Injunctive Relief. (Ct. Rec. 144).

18 Plaintiffs are represented by Darrell Cochran and Thaddeus Martin.

19 Defendants are represented by Andrew Cooley, Stewart Estes, Kim  
20 Waldbaum and Richard Jolley.

21 **I. BACKGROUND**

22 This is a class action arising from the response of the City of  
23 Pullman Police Department to an altercation at the Top of China  
24 Restaurant and The Attic Nightclub on September 8, 2002. The alleged  
25 facts are set forth in detail in the Court's Order Granting in Part  
26 and Denying in Part Defendants' Motion for Partial Summary Judgment  
Re: Qualified Immunity. (Ct. Rec. 240). Plaintiffs seek monetary  
damages and injunctive relief. Specifically, Plaintiffs seek an  
order: (1) enjoining the Defendants from discharging pepper spray into

1 a confined building; (2) enjoining the defendants from discharging  
2 pepper spray without first establishing their physical presence and  
3 verbalizing a cease and desist order; (3) ordering the City of Pullman  
4 to provide proper training for its officers regarding the use of  
5 pepper spray and other gases; (4) ordering the City of Pullman to  
6 develop a meaningful, effective and mandatory cultural awareness and  
7 diversity training to ensure its officers do not respond  
8 inappropriately to situations involving African American or  
9 ethnicities other than Caucasians; and (5) awarding the Plaintiffs  
10 prospective equitable relief to prevent future misconduct. Amended  
11 Complaint, at ¶¶ 10.2-10-7. Prior to the consolidation of the Arnold  
12 action (CV-03-335-FVS) into this action, the Court granted Defendants'  
13 motion for partial summary judgment on Plaintiffs' claims for  
14 injunctive relief based on a lack of standing. (Ct. Rec. 137).  
15 Plaintiffs move for reconsideration.

## 16 **II. DISCUSSION**

### 17 **A. Standard of Review**

18 The Federal Rules of Civil Procedure do not mention a "motion for  
19 reconsideration." Even so, a "motion for reconsideration" is treated  
20 as a motion to alter or amend judgment under Rule 59(e) if it is filed  
21 within ten days of entry of judgment. *United States v. Nutri-Cology,*  
22 *Inc.*, 982 F.2d 394, 397 (9th Cir.1992). "Reconsideration is  
23 appropriate if the district court (1) is presented with newly  
24 discovered evidence, (2) committed clear error or the initial decision  
25 was manifestly unjust, or (3) if there is an intervening change in  
26 controlling law." *School Dist. No. 1J, Multnomah County, OR v.*

1       *Acands, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Here, Plaintiffs  
 2 appear to argue there is new evidence the Court should consider. On  
 3 that basis, the Court exercises its discretion and reconsiders its  
 4 Order granting Defendants' motion for partial summary judgment on  
 5 Plaintiffs' claims for declaratory and injunctive relief.

6                  ***B. Standing to Seek Injunctive Relief***

7       To obtain standing to seek prospective injunctive relief, the  
 8 Plaintiffs must demonstrate they are "realistically threatened by a  
 9 repetition of [the violation]." *City of Los Angeles v. Lyons*, 461  
 10 U.S. 95, 109, 103 S.Ct. 1660, 1669, 75 L.Ed.2d 675 (1983). Plaintiffs  
 11 may demonstrate a sufficient likelihood of future injury in two ways.  
 12 First, they may establish that at the time of their injury, the  
 13 Defendants had a written policy from which the Plaintiffs' injuries  
 14 stem. *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir.  
 15 2001). Second, Plaintiffs may show that their injuries are part of a  
 16 "pattern of officially sanctioned officer behavior ... violative of  
 17 [their federal] rights." *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th  
 18 Cir. 1985). This second test is met if the Defendants have repeatedly  
 19 engaged in illegal conduct so that there is a sufficient possibility  
 20 of the conduct occurring in the future. *Armstrong v. Davis*, 275 F.3d  
 21 849, 861 (9th Cir. 2001).

22       Applying this law, the Court concluded in its Order that  
 23 Plaintiffs failed to "create material questions of fact regarding  
 24 their standing to seek injunctive relief [because they failed to]  
 25 produce evidence to suggest a pattern of officially sanctioned officer  
 26 behavior or a written policy from which their injuries stem." (Ct.

1 Rec. 37, at 8). Specifically, the Court noted that it had been  
 2 "presented with very little evidence of any prior use of pepper spray  
 3 by Pullman Police Officers before or after September 8, 2002, and no  
 4 evidence of a written policy pursuant to which the officers may have  
 5 acted on September 8, 2002." (Ct. Rec. 37, at 3).

6       1. Prior Instances of Improper Behavior

7       "To create an issue of fact regarding standing, the plaintiff  
 8 must, at minimum, provide descriptions of multiple instances of  
 9 improper behavior." (Ct. Rec. 37, at 7) (citing *Hodgers-Durgin v. De*  
 10 *La Vina*, 165 F.3d 667 (9th Cir. 1999)). The Court previously dismissed  
 11 Plaintiffs' claims for injunctive relief because Plaintiffs had not  
 12 presented "evidence sufficient to create a material question of fact  
 13 as to whether there was a pattern of officially sanctioned improper  
 14 use of pepper spray by the Pullman Police Department." (Ct. Rec. 37,  
 15 at 3). In their motion for reconsideration, Plaintiffs present very  
 16 little new evidence of improper behavior. In fact, a most of the  
 17 evidence relied upon by Plaintiffs in their motion for reconsideration  
 18 has already been considered by the Court. As "new" evidence,  
 19 Plaintiffs assert that the use of pepper spray by Pullman Policy  
 20 officers "appears to be escalating." Plaintiffs contend the use of  
 21 force reports for pepper spray demonstrate this problem. However,  
 22 Plaintiffs have failed to present any new evidence showing that pepper  
 23 spray has been used by the Pullman Police officers in a discriminatory  
 24 or illegal manner before or after the incident on September 8, 2002.  
 25 The use of pepper spray in itself does not necessarily constitute  
 26 improper behavior. As a way of explaining why they have not produced

any new evidence of improper behavior, Plaintiffs allege the use of force reports provided by Defendants in discovery were "incomplete and misleading." However, these reports are not the subject of any discovery dispute before the Court. Further, Defendants note that of the documented uses of pepper spray by the Pullman Police Department officers from 1998-2004 where the race of the suspects was known, other than the incident at issue in this case, African Americans were subject to pepper spray four (4) times while white individuals were subject to pepper spray at least thirty (30) times. Further, no Plaintiff in this action has alleged improper use of pepper spray against him or her before or after the incident at issue in this case.

The Court concludes Plaintiffs have again failed to show "multiple instances of improper behavior" sufficient to create an issue of fact regarding standing to seek prospective injunctive relief. See Ct. Rec. 37, at 7 ("To create an issue of fact regarding standing, the plaintiff must, at minimum, provide descriptions of multiple instances of improper behavior." (citing *Hodgers-Durgin v. De La Vina*, 165 F.3d 667 (9th Cir. 1999))). Plaintiffs have not presented the Court with any new evidence sufficient to create a material question of fact as to whether there was a pattern of officially sanctioned improper use of pepper spray by the Pullman Police Department.

## 2. Policy

Plaintiffs may also obtain standing to seek prospective injunctive relief by demonstrating a sufficient likelihood of future injury by establishing that at the time of their injury, Defendants

had a written policy from which the Plaintiffs' injuries stem. See *Hawkins*, 251 F.3d at 1237. Here, Plaintiffs allege the Pullman Police Department's policy that equates the use of pepper spray with a peaceful escort either "encourages or allows" the kind of behavior causing Plaintiffs' injuries. Specifically, Plaintiffs argue the Defendants' "commonplace use of racially discriminatory jokes" viewed together with "Defendants' policy" that equate the use of pepper spray with a peaceful escort shows that the Pullman Police officers' "unconscious racial bias is allowed to motivate officer actions against Plaintiffs and other Pullman citizens." *Pls. Mot. to Reconsider*, at 22. However, Plaintiffs provide no evidentiary support for these conclusory allegations.

The Pullman Police Department Policies and Procedures Manual ("PPD Manual") contains guidelines for the use of force. Chapter 10, titled "Use of Force," states in pertinent part:

"Use of OC spray applies when a member can legally use force per RCW 9A.16.020. OC spray is incorporated into the member's use of force options. OC spray is considered the same level of force as escorting someone. Members will be required to undergo approved training before being issued and using OC spray. Members will carry only OC spray that is approved and issued by the department. Supervisors may require members to carry OC spray."

PPD Manual, 2002, Ch. 10 § 2.15 et seq., p. 0177. Plaintiffs have not shown that this one line from a 349-page manual represents a formal "policy" with respect to the use of pepper spray. In addition to this section of the PPD Manual, Section 2.2 of Chapter 10, at page 0171, states:

The use of force upon or toward another person by a member is authorized when necessary in accomplishing a lawful

1           objective consistent with RCW 9A.16.020. Members shall use  
2           only the minimum amount of force necessary to effect the  
3           lawful purpose intended. The intent of force is not to  
4           injure but to ensure compliance with lawful objectives.

5           The Court previously addressed Plaintiffs' theory that equating  
6           the use of pepper spray with an "escort" constitutes an official  
7           policy within the Pullman Police Department. See Order Granting  
8           Defendants' Motion for Summary Judgment Re: Plaintiffs' 1983 Claims.  
9           (Ct. Rec. 303). The Court concluded that Plaintiffs had failed to  
10          show the Defendant Officers were acting pursuant to a policy when they  
11          disbursed pepper spray at the Top of China Restaurant and The Attic  
12          nightclub. Plaintiffs have offered no additional evidence showing the  
13          Officers were acting pursuant to a policy when they used pepper spray  
14          on Plaintiffs.

15          Plaintiffs point to deposition testimony to argue that within the  
16          Pullman Police Department exists a "commonplace use of racially  
17          discriminatory jokes" that creates a "workplace culture of racial  
18          bias." However, the deposition testimony only refers to jokes the  
19          officers exchanged among themselves and there is no evidence that this  
20          behavior occurred elsewhere. Further the Pullman Police Department  
21          has a policy that explicitly forbids racial discrimination. Moreover,  
22          use of racially discriminatory jokes within the workplace is  
23          insufficient to show Plaintiffs' injuries stemmed from a "written"  
24          policy.

25          The Court concludes Plaintiffs have not established that at the  
26          time of their injury, Defendants had a written policy from which the  
Plaintiffs' injuries stem. Thus, Plaintiffs do not have standing

1 under this theory to seek prospective injunctive relief. See *Hawkins*,  
2 251 F.3d at 1237. Accordingly,

3 **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Reconsider  
4 Dismissal of Claims for Declaratory and Injunctive Relief (**Ct. Rec.**  
5 **144**) is **DENIED**

6 **IT IS SO ORDERED.** The District Court Executive is hereby  
7 directed to enter this order and furnish copies to counsel.

8 **DATED** this 6th day of June, 2006.

9  
10 

---

*s/ Fred Van Sickle*  
Fred Van Sickle  
United States District Judge  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26